Supreme Court, U.S.
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No. _____

**In the**
**Supreme Court of the United States**

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Dorothy B. Malis,

*Petitioner*,

v.

Commissioner of Internal Revenue

*Respondent*.

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**On Writ Of Certiorari To The**
**Ninth Circuit Court of Appeals**

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# BRIEF FOR THE PETITIONER

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Dorothy B. Malis
*Petitioner In Pro-Se*
613 Plumer Street
Costa Mesa, California 92627
(949) 548-1223

April 15, 2005

## QUESTION PRESENTED

Did the Court of Appeals fail to give credence to Petitioner's Constitutional claim that the U.S. Tax Court's review of Petitioner claim violated her due process right? - i.e., especially since Petitioner apprised the Court of Appeals that the same issue was pending before this Court in Estate of Kanter v. C.I.R. (No. 03-184).

## TABLE OF CONTENTS

QUESTION PRESENTED..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES..... iii

OPINIONS BELOW..... 1

JURISDICTION..... 1

CONSTITUTIONAL PROVISION..... 1

STATEMENT..... 1-2

ARGUMENT..... 2

**THE COURT OF APPEALS FAILED TO GIVE CREDENCE TO PETITIONER'S CONSTITUTIONAL CLAIM THAT THE U.S. TAX COURT VIOLATED HER DUE PROCESS RIGHT SINCE PETITIONER APPRISED THE COURT OF APPEALS THAT THE SAME ISSUE WAS PENDING BEFORE THIS COURT IN ESTATE OF KANTER V. C.I.R. (NO. 03-184)**..... 2-5

CONCLUSION..... 5

APPENDIX

LOWER COURT'S OPINION ..... 1a – 2a

LOWER COURT'S OPENING BRIEF .. 3a – 11a

## TABLE OF AUTHORITIES

Kanter v. C.I.R. (No. 03-184 – Decided March 7, 2005)..... Passim

Anderson v. City Bessemer City, 470 U.S. 564 (1985)..... 4

U.S. v. Raddatz, 477 U.S. 667 (1980)..... 4

Evitts v. Lucey, 469 U.S. 387 (1985)..... 4

Ward v. Village of Monroeville, 409 U.S. 57 (1972)..... 5

Bd. of Regents v. Roth, 408 U.S. 564 (1972)..... 5

## BRIEF FOR THE PETITIONER

## OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit rejecting Petitioner's Constitutional claim on appeal, is unreported. It is reproduced at Appendix – Exhibit "A".

## JURISDICTION

The judgment of the Court of Appeals was entered on February 10th, 2005. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISION

The Due Process Clause of the Fifth Amendment to the United Stated Constitution.

## STATEMENT

Petitioner resides in Costa Mesa, California. Petitioner did not file a federal income tax return for 1990 and 1991. Respondent sent Petitioner a notice of deficiency for 1990 and 1991 in which Respondent determined that Petitioner had deficiency of $12,980 for 1990 and $12,993 for 1991

Respondent also determined that Petitioner was liable for additions to tax for failure to file under § 6651 (a)(1) of $3,245 for 1990 and $3,233 for 1991 and for failure to pay estimated tax under § 6654 of $853 for 1990 and $737 for 1991.

Respondent assessed Petitioner's tax and interest for 1990-91 and sent Petitioner a notice and demand for payment. Respondent sent Petitioner a Notice of Federal Tax Lien Filing and Your Right to a Hearing under § 6320 and 6330 relating to Petitioner's unpaid taxes for 1990 and 1991. Petitioner requested a hearing under § 6330 (b). Petitioner attached several arguments to her request. Petitioner also asked to transcribe or make an audio recording of the § 6330 (b) hearing. Respondent denied Petitioner's request to transcribe or record the § 6330 (b) hearing. Petitioner attended the hearing but did not record it. Respondent issued a notice of determination in which Respondent determined that the filing of the tax lien was appropriate.

## ARGUMENT

THE COURT OF APPEALS FAILED TO GIVE CREDENCE TO PETITIONER'S CONSTITUTIONAL CLAIM THAT THE U.S. TAX COURT VIOLATED HER DUE PROCESS RIGHT SINCE PETITIONER APPRISED THE COURT OF APPEALS THAT THE SAME ISSUE WAS PENDING BEFORE THIS COURT IN ESTATE OF KANTER V. C.I.R. (No. 03-184).

On appeal, before the Court of Appeals, Petitioner contended that Respondent improperly refused to permit her to transcribe or record the hearing, and that Respondent failed to provide discovery, information and documents needed to prepare a defense and preserve an appeal. The failure of Respondent to make an adequate record of the administrative proceedings denied Petitioner's statutory right to an effective review and denied Petitioner's right to Due Process.

Here, the Court of Appeals failed to give credence to Petitioner's Constitutional claim that the Tax Court's review of Petitioner's claim violated her due process rights – especially since Petitioner apprised the Court of Appeals that the same issue was pending before this Court in Estate of Kanter v. C.I.R. (No. 03-184). See Petitioner's Opening Brief at page 6, lines 22-25, reproduced at Appendix – Exhibit "B".

The Court of Appeals issued its decision on February 10th, 2005, and did not mention or give relevance to the ***Kanter*** case. On March 7th, 2005, this Court issued its decision on the ***Kanter*** case and held, i.e., "The Tax Court may not exclude from the record on appeal Rule 183(b) reports submitted by special trial judges. No statute authorizes, and Rule 183's current text does not warrant, the concealment at issue."I

The *Kanter* case was and now is relevant to Petitioner's case in that the "failure of Respondent to make an adequate record of the administrative proceedings denied Petitioner's statutory right to an effective review, denied Petitioner her right to due process, and the Tax Court improperly concluded that any error by the Appeals Officer in refusing to allow Petitioner to transcribe or record the hearing for the purposes of preserving the record for appeal was "harmless."

Petitioner further appraised the Court of Appeals that the failure to provide an adequate record for appeal violated this Court's central precedents on the constitutional role of credibility judgments, fact-finding, and appellate review in judicial and **administrative processes**. Citing, Anderson v. City Bessemer City, 470 U.S. 564 (1985); United States v. Raddatz, 447 U.S. 667. 677 (1980).

The final decision of a fact finder depends by law on an undisclosed judge's or **hearing officer's** report that has legally operative effect under the due regard to appellate review. Failure to include findings or record findings violates a taxpayer's due process rights to a fair initial trial and proper appellate review. Evitts v. Lucey, 469 U.S. 387, 393 (1985)(applying due process to rights on appeal.)

The failure to provide a record or make a record of findings, the item of greatest significance to appellate review, constitutes an immediate and obvious violation of due process. Certain elements of judicial process are so central to fair adjudication that their absence compromises fair process without the need for any further balancing of costs and benefits. A "neutral and detached judge in the first instance" is one. Ward v. Village of Monroeville, 409 U.S. 57, 62 (1972). The right to "some form of hearing" before the government infringes property rights is another. Bd. of Regents v. Roth, 408 U.S. 564, 570-571 n. 8 (1972). Taxpayers cannot be deprived of the right to adequate appellate review because, through no action of their own, the fact-finder refuses to provide an adequate record of its decision for review.

## CONCLUSION

The lower Court's decision should be reversed and remanded in light of this Court's decision and reasoning in Ballard V. Commissioner of Internal Revenue (No. 03-184 – Decided March 7, 2005).

Respectfully submitted,

Dorothy B. Malis
*Petitioner In Pro-Se*
613 Plumer Street
Costa Mesa, California 92627

Dated: April 15, 2005

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
FEB 10 2005
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U.S. COURT OF APPEALS

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|---|---|
| DOROTHY B. MALIS,<br><br>Petitioner-Appellant,<br><br>v.<br><br>COMMISSIONER OF INTERNAL REVENUE<br><br>Respondent-Appellee. | NO. 04-73717<br><br>U.S.Tax Ct. No. 4813-03L<br><br>**MEMORANDUM*** |

Appeal from the United States Tax Court
Submitted February 7, 2003**

Before: FERNANDEZ, GRABER and GOULD, Circuit Judges.

Dorothy B. Malis appeals pro se the Tax Court's summary judgment upholding the Internal revenue Service Appeals Office's

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

determination that the Commissioner of Internal Revenue may proceed with the collection action concerning Malis's unpaid 1990 and 1991 federal income taxes.

The Tax Court properly concluded that any error by the Appeals Officer in refusing to allow Malis to record her Collection Due Process ("CDP") hearing was harmless. The Tax Court was authorized to issue its decision as a bench opinion by Tax Court Rule 152, and it had jurisdiction over this case pursuant to Internal Revenue Code § 6330(d)(1), because the underlying unpaid income tax falls within the Tax Court's jurisdiction. The Tax Court also properly determined that Malis failed to raise any genuine issue of material fact. Hansen v. United States, 7 F.3d 137, 138 (9th Cir. 1993)

**AFFIRMED.**

APPEAL NO. 04-73717

UNITED STATES COURT OF APPEALS

FOR THE

NINTH CIRCUIT

Dorothy B. Malis,

Petitioner/Appellant,

VS.

Commissioner of Internal Revenue,

Respondent/Appellee.

Appeal from the United States Tax Court
Washington D.C.
Docket No. 4813-03L
The Honorable John o. Colvin

**Petitioner's Pro-Se Opening Brief**

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## TABLE OF AUTHORITIES

CASES Page:

Estate of Rapp V. C. I. R., 140 F.3d 1211 (9th Cir. 1998)..... 3

Anderson V. City of Bessemer City, 470 U.S. 564 (1985)..... 3

Evitts V. Lucey, 469 U.S. 387 (1985) ..... 3

Logan V. Zimmerman Brush Co., 455 U.S. 422 (1982)..... 4

Ward V. Village of Monroeville, 409 U.S. 57 (1972)..... 5

Bd. Of Regents V. Roth, 408 U.S. 564 (1972).. 5

Estate of Kanter V. C. I. R. (No. 03-1034)..... 6

Taylor V. C.I.R., 258 F.2d 89 (2nd Cir. 1958).. 7

Northern Pipeline V. Marathon Pipe Line Co., 102 S.Ct. 2858 (1982)..... 7

National Mutual Insurance Co. V. Tidewater Transfer Co., 337 U.S. 582 (1948)..... 7

Constitution:
Fifth Amendment U.S. Const.

Statutes:
26 U.S.C. § 7482(a).

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... i

STATEMENT OF ISSUES PRESENTED..... 3

1. Did the United States Tax Court violate Petitioner's Due Process Rights under the Fifth Amendment to the United Constitution?..... 3

2. Did the United States Tax Court have jurisdiction to hear Petitioner's case?..... 3

STATEMENT OF JURISDICTION..... 3

STATEMENT OF THE CASE..... 3-4

ARGUMENTS

I. SECRET TRIAL JUDGE FINDINGS OF FACT VIOLATE DUE PROCESS AND FEDERAL STATUTES THAT GOVERN THE TAX COURT..... 5

A. Petitioner's Due Process Rights Were Violated..... 5-6

B. The Tax Court did not have jurisdiction..... 7

CONCLUSION..... 7

STATEMENT OF RELATED CASES..... 8

CERTIFICATE OF COMPLIANCE..... 8

CERTIFICATE OF SERVICE..... 8

## STATEMENT OF ISSUES PRESENTED

1. Did the United States Tax Court violate Petitioner's Due Process rights under the Fifth Amendment to the United States Constitution?

3. Did the Tax Court have jurisdiction to hear Petitioner's case?

## STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 26 U.S.C. § 7482(a), to review United States Tax Court decisions in the same manner and to the same extent as decisions of the district court in civil bench trials. Estate of Rapp V. Commissioner of Internal Revenue, 140 F.3d 1211, 1214-15 (9th Cir. 1998). This Court reviews the issues, which are pure questions of law, de novo. Id. at 1215.

## STATEMENT OF THE CASE

Petitioner resides in Costa Mesa, California. Petitioner did not file a federal income tax return for 1990 and 1991. Respondent sent Petitioner a notice of deficiency for 1990 and 1991 in which Respondent determined that Petitioner had deficiency of $12,980 for 1990 and $12,993 for 1991. Respondent also determined that Petitioner was liable for additions to tax for failure to file under § 6651 (a)(1) of $3,245 for 1990 and $3,233 for 1991 and for failure to pay estimated tax under § 6654 of $853 for 1990 and $737 for 1991.

Respondent assessed Petitioner's tax and interest for 1990-91 and sent Petitioner a notice and demand for payment. Respondent sent Petitioner a Notice of Federal Tax Lien Filing and Your Right to a Hearing under § 6320 and 6330 relating to Petitioner's unpaid taxes for 1990 and 1991. Petitioner requested a hearing under § 6330 (b). Petitioner attached several arguments to her request. Petitioner also asked to transcribe or make an audio recording of the § 6330 (b) hearing. Respondent denied Petitioner's request to transcribe or record the § 6330 (b) hearing. Petitioner attended the hearing but did not record it. Respondent issued a notice of determination in which Respondent determined that the filing of the tax lien was appropriate.

Petitioner contends that Respondent improperly refused to permit her to transcribe or record the hearing, and that Respondent failed to provide discovery, information and documents needed to prepare a defense and preserve an appeal. The failure of Respondent to make an adequate record of the administrative proceedings denied Petitioner's statutory right to an effective review and denied Petitioner's right to Due Process. Further, the United States Tax Court did not have jurisdiction to hear Petitioner's case.

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## ARGUMENTS

### I. SECRET TRIAL JUDGE FINDINGS OF FACT VIOLATE DUE PROCESS AND FEDERAL STATUTES THAT GOVERN THE TAX COURT.

**A. Petitioner's Due Process Rights were violated.**

Secret trial judge reports violate the Supreme Court's central precedents on the constitutional role of credibility judgments, fact-finding, and appellate review in judicial and administrative processes. See, Anderson V. City of Bessemer City, 470 U.S. 564 (1985); United States V. Raddatz, 447 U.S. 667, 677 (1980).

The final decision of a fact finder depends by law on an undisclosed judge's or hearing officer's report that has legally operative effect under the "due regard" standard of Rule 183. Failure to include findings or record findings violates a taxpayer's due process rights to a fair initial trial and proper appellate review. See, Evitts V. Lucey, 469 U.S. 387, 393 (1985)(applying due process to rights on appeal); Logan V. Zimmerman Brush Co., 455 U.S. 422, 429 n. 5 (1982)(once access to courts is a legislative entitlement, government "may not deprive someone of that access unless the balance of state and private interests favor the government scheme").

The failure to provide a record or make a record of findings, the item of greatest significance to appellate review, constitutes an immediate and obvious violation of due process.

Constitutionally proper appeal must be based on a record that contains all the relevant information, including, in cases like this, the findings of fact upon which the decision under review was required to be based and to which the reviewing court owes deference. Certain elements of judicial process are so central to fair adjudication that their absence compromises fair process without the need for any further balancing of costs and benefits. A "neutral and detached judge in the first instance" is one. Ward V. Village of Monroeville, 409 U.S. 57, 62 (1972). The right to "some form of hearing" before the government infringes property rights is another. Bd. Of Regents V. Roth, 408 U.S. 564, 570-571 n. 8 (1972).

Respondent's extinguishment of a cause of action without "the opportunity to present the case and have its merits fairly judged" is another. Logan, 455 U.S. at 433-434. When constitutionally protected property and liberty interests are at stake, as here, failure of the record on review to include those initial findings on which a fact-finder's final decision must, by law, depend is similarly a per se violation of due process. Otherwise, a reviewing court required to engage in "clearly erroneous" review cannot, as here, perform it adjudicative function. Taxpayers cannot be deprived of the right to adequate appellate review because, through no action of their own, the fact-finder refuses to provide an adequate record of its decision for review.

Petitioner's Due Process rights were violated. A case in point and pending before the Supreme Court on the issues presented herein, can be found in Estate of Kanter, et. al. V. Commissioner of Internal Revenue (No. 03-1034).

## B. THE TAX COURT DID NOT HAVE JURISDICTION

The jurisdiction of the Tax Court is purely statutory, and it does not have general equitable jurisdiction. Taylor V. C.I.R., 258 F.2d 89 (2nd Cir. 1958). The United States Tax Court did not have jurisdiction to hear Petitioner's case, Northern Pipeline Const. V. Marathon Pipe Line Co. (1982) 102 S.Ct. 2858, and did not have "territorial jurisdiction" to hear Petitioner's case. Cf. National Mutual Insurance Co. V. Tidewater Transfer Co., Inc. (1948) 337 U.S. 582.

## CONCLUSION

For the foregoing reasons, Petitioner requests that this Court reverse the Tax Court's findings and remand this cause with instruction to dismiss the summary judgment with prejudice.

Respectfully submitted,

/s/
Dated: November 1, 2004 Dorothy B. Malis

## STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6, Rules of the United States Court of Appeals for the Ninth Circuit, the Petitioner represents that she knows of no other related case within the meaning of this rule.

/s/
Dorothy B. Malis

## CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(e)(3), I certify that this Pro-Se Opening Brief is proportionately spaced, has a typeface of 14 points and contains not more that 3,720 words.

/s/
Dorothy B. Malis

## CERTIFICATE OF SERVICE

I, Dorothy B. Malis, hereby certify that I have served a copy of the foregoing Pro-Se Opening Brief by placing same in the U.S. Mail addressed to;

Sara Ann Ketchum
Lead Counsel
Tax Division
P.O. Box 502
Washington, D.C. 20044

Dated: November 1, 2004

/s/
Dorothy B. Malis